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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Clarence Wayne Dixon,

Plaintiff,

v.

Arizona Department of Corrections,
Rehabilitation & Reentry (ADCRR), et
al.,

Defendants.

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No. CV-22-00604-PHX-DJH (JFM)

ORDER

Plaintiff Clarence Wayne Dixon, who is represented by counsel and confined to a Death Watch cell in the ADCRR's Browning Unit, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, the Americans With Disabilities Act (ADA), 42 U.S.C. § 12131, et seq., and Section 504 of the Rehabilitation Act of 1973 (RA), 29 U.S.C. § 794. (Doc. 1.) Also before the Court is Plaintiff's Emergency Motion for Temporary Restraining Order or Preliminary Injunction (Doc. 4).¹

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which

¹ The Court will address the Emergency Motion by separate Order once briefing is complete.

1 relief may be granted, or that seek monetary relief from a defendant who is immune from
 2 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

3 A pleading must contain a “short and plain statement of the claim *showing* that the
 4 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 5 not demand detailed factual allegations, “it demands more than an unadorned, the-
 6 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 7 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 8 conclusory statements, do not suffice.” *Id.*

9 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 10 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 11 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 12 that allows the court to draw the reasonable inference that the defendant is liable for the
 13 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 14 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 15 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 16 allegations may be consistent with a constitutional claim, a court must assess whether there
 17 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

18 **II. Complaint**

19 In his five-count Complaint, Plaintiff sues ADCRR Director David Shinn, ASPC-
 20 Browning Unit Warden Travis Scott, and ASPC-Florence Warden James Kimble, all in
 21 their official capacities, and “John Does,” who are unknown personnel, staff, or agents of
 22 ADCRR or the State of Arizona and who have participated or will participate in Plaintiff’s
 23 incarceration on Death Watch for 35 days prior to his execution. Plaintiff seeks declaratory
 24 and injunctive relief.

25 Plaintiff alleges the following facts: Plaintiff is scheduled to be executed on May
 26 11, 2022, pursuant to a warrant issued by the Arizona Supreme Court. (Doc. 1 ¶ 1.) Upon
 27 the Arizona Supreme Court’s issuance of the execution warrant on April 5, 2022, Plaintiff
 28 was transported from his close custody cell in Central Unit to a Death Watch cell in the

1 Browning Unit, where he will remain until he is executed pursuant to ADCRR's execution
 2 protocol, outlined in Department Order (DO) 710. (*Id.* ¶ 2.)

3 Plaintiff is 66 years old, visually disabled, physically frail, and severely mentally
 4 ill. (*Id.* ¶ 1.) Plaintiff has glaucoma and was declared legally blind in both eyes in 2015
 5 and is substantially limited in major life activities such as reading and writing, which makes
 6 him a qualified individual with disabilities within the meaning of the Americans with
 7 Disabilities Act (ADA). (*Id.* ¶¶ 18, 19.) ADCRR has designated Plaintiff as having
 8 "Medical ADA Restrictions/Special Needs" due to his blindness, and ADCRR has
 9 provided accommodations to allow Plaintiff to engage in activities of daily living,
 10 including the assistance of a blind attendant or aide (another prisoner) and use of several
 11 auxiliary aids such as a folding cane, cassette tape recorder, tape player, magnifying ocular
 12 eye piece, talking book, talking clock, a tablet, and UV sunglasses. (*Id.* ¶¶ 20, 21.) The
 13 blind attendant or aide has helped Plaintiff navigate his surroundings by escorting him to
 14 and from medical appointments and visitation; completing prison forms and other
 15 paperwork, including health needs requests (HNRs); locating items in Plaintiff's cell;
 16 identifying what and who are in his immediate surroundings; and reading and transcribing
 17 correspondence, including letters, emails, and legal mail. (*Id.* ¶ 21.) Plaintiff has been
 18 assigned a blind aide since 2017 as part of the ADA accommodations provided by ADCRR.
 19 (*Id.* ¶ 82.)

20 Plaintiff is also seriously mentally ill (SMI) and is diagnosed with paranoid
 21 schizophrenia. (*Id.* ¶ 23.) During criminal proceedings in 1978, Plaintiff was found to be
 22 incompetent and not guilty by reason of insanity, and civil commitment proceedings were
 23 ordered. (*Id.* ¶ 27.) Before the civil commitment proceedings began, the murder for which
 24 Plaintiff is scheduled to be executed occurred. (*Id.*) During postconviction proceedings,
 25 Plaintiff was found to suffer from significant cognitive impairments, severe depression,
 26 paranoia, and perceptual disturbances, and he was diagnosed with a psychotic disorder,
 27 schizophrenia. (*Id.* ¶ 32.) Plaintiff was recently reevaluated by Dr. Amezcua-Patino, who
 28 concluded that Plaintiff is incompetent to be executed because his "capacity to understand

1 the rationality of his execution is contaminated by the schizophrenic process” (*Id.*
 2 ¶ 35.) Dr. Amezcuia-Patino has concluded that Plaintiff’s mental illness puts him at
 3 heightened risk of suffering physical and psychiatric harm on Death Watch, asserting that
 4 “deathwatch isolation is analogous to psychological torture that is highly likely to lead to
 5 psychiatric decompensation.” (*Id.* ¶ 36.) Dr. Amezcuia-Patino specifically determined that
 6 in Plaintiff’s case, the psychosocial and physical stress related to increased isolation, lack
 7 of any privacy, and 24-hour supervision is likely to worsen his delusional and paranoid
 8 thinking [and] in the context of his blindness, deathwatch becomes a new challenge
 9 with new uncertainties that will challenge all of his acquired abilities to manage his
 10 blindness.” (*Id.*)

11 Prior to Plaintiff’s transfer to Death Watch, ADCRR informed Plaintiff’s counsel
 12 that it would allow Plaintiff to have continued access to and use of nine physical and
 13 auxiliary aids such as his folding cane, cassette tape recorder, magnifying ocular eye piece,
 14 talking book, and tablet with dime feature, as well as access to and use of his current blind
 15 aide, fellow Death Row Inmate Brad Nelson, who would be transferred with Plaintiff and
 16 housed in the adjoining cell. (*Id.* ¶ 42.) But Nelson declined to serve as Plaintiff’s blind
 17 aide in a Death Watch setting as did a second prisoner identified by ADCRR. (*Id.* ¶ 46.)
 18 After the second prisoner declined to serve as Plaintiff’s blind aide, ADCRR’s counsel
 19 informed Plaintiff’s counsel “this responsibility now falls to your office to designate
 20 personnel to perform this task.” (*Id.* ¶ 48.) Without a blind aide, Plaintiff is severely
 21 limited in his activities of daily living, including reading, writing, orienting himself to his
 22 surroundings, and corresponding with others, including members of his legal team. (*Id.*
 23 ¶ 82.)

24 While on Death Watch, Plaintiff is under 24-hour continuous observation by
 25 corrections officers and cameras, and staff write down Plaintiff’s “activities and behavior
 26 until the sentence of death is imposed” in an observation record. (*Id.* ¶ 56.) Plaintiff is not
 27 allowed to possess personal property other than select clothing items, several approved
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1 auxiliary aids, one box each of legal and religious materials, a pencil and paper, and a book
 2 or periodical. (*Id.* ¶ 57.)

3 DO 710's Death Watch protocol subjects Plaintiff to 35 days of solitary confinement
 4 while he awaits his death. (*Id.* ¶ 72.) Solitary confinement has been shown to have adverse
 5 psychological and physiological effects on a prisoner, and individuals with underlying
 6 mental health conditions, such as Plaintiff, are at an increased risk of suffering harm under
 7 DO 701's Death Watch Protocol. (*Id.* ¶¶ 73-75.) People in solitary confinement "are
 8 subjected to decreased meaningful and positive contact with others, limited stimuli inside
 9 a small cell, and unpredictable loud noises," and those extremes are exacerbated for blind
 10 individuals. (*Id.* ¶ 79.)

11 DO 710's Death Watch protocol subjects Plaintiff to "persistent reminders of his
 12 impending execution, simultaneous sensory deprivation and sensory overload (including
 13 the fear of unpredictable and unfamiliar noises and voices), the physical danger of
 14 navigating unfamiliar surroundings as a blind man, continuous observation by those he
 15 cannot see, and he faces an increased risk of paranoia, psychosis, self-harm, and
 16 suicidality." (*Id.* ¶ 86.) "The compounding effects of knowing he is being continuously
 17 observed and filmed, being unable to see the corrections officers who are watching him,
 18 and being subjected to unpredictable routines, unfamiliar noises, and a distorted sense of
 19 time is analogous to 'hooding' torture used to deprive prisoners of war of visual
 20 environmental cues." (*Id.*) Subjecting Plaintiff to continuous observation, even when
 21 using the toilet, places Plaintiff at heightened risk of suffering humiliating and painful
 22 gastro-intestinal discomfort. (*Id.* ¶ 92.)

23 DO 710's Death Watch protocol is inconsistent with evolving standards of decency.
 24 (*Id.* ¶ 94.) Defendants are aware of the substantial risk of harm Plaintiff is experiencing
 25 on Death Watch because they are aware of his legal blindness, mental illness, and need for
 26 an ADA-mandated blind aide. (*Id.* ¶ 95.) DO 710's Death Watch protocol is not narrowly
 27 tailored to further a legitimate State interest, detaining Plaintiff on Death Watch is not
 28 necessary and not narrowly tailored to prevent a risk of self-harm and actually increases

1 the risk of self-harm, and Defendants have not reasonably abated the risk of serious harm
 2 to Plaintiff. (*Id.* ¶¶ 97-100.)

3 Count One asserts a violation of Plaintiff's Eighth Amendment rights by subjecting
 4 prisoners under a sentence of death to DO 710's Death Watch protocol. Plaintiff alleges
 5 that DO 710's Death Watch protocol is facially unconstitutional under the Eighth and
 6 Fourteenth Amendments to the United States Constitution and DO 710's Death protocol is
 7 unconstitutional as applied to Plaintiff, who is legally blind and suffers from paranoid
 8 schizophrenia. (*Id.* ¶¶ 107-108.)

9 Count Two asserts a claim of deliberate indifference to Plaintiff's health and safety
 10 under the Eighth Amendment. Plaintiff alleges that ADCRR is aware of Plaintiff's legal
 11 blindness, mental illness, and need for an ADA-mandated blind aide, which ADCRR has
 12 provided in the past, and Plaintiff's move to Death Watch places him at increased risk of
 13 psychological and physical suffering. (*Id.* ¶ 111.)

14 Count Three asserts a violation of Title II of the ADA. Plaintiff alleges that he is a
 15 qualified individual with disabilities within the meaning of the ADA, ADCRR's services,
 16 programs, and activities are covered by the ADA, and Defendants have discriminated
 17 against Plaintiff by failing to accommodate him and make a reasonable modification to
 18 their policies, procedures, and/or practices to permit Plaintiff access to his blind aide while
 19 on Death Watch prior to his execution. (*Id.* ¶¶ 117-120.)

20 Count Four asserts of violation of Section 504 of the Rehabilitation Act (RA) of
 21 1973. Plaintiff alleges that he is a qualified individual with a disability within the meaning
 22 of the RA, that ADCRR, by receiving federal financial assistance, is subject to the
 23 requirements of Section 504 of the RA, and Defendants have discriminated against Plaintiff
 24 by failing to accommodate him and making a reasonable modification to their policies,
 25 procedures, and/or practices to permit Plaintiff access to his blind aide while on Death
 26 Watch prior to his execution. (*Id.* ¶¶ 134-138.)

27 Plaintiff denominates a Fifth Cause of Action as one for declaratory and injunctive
 28 relief. (*Id.* ¶¶ 142-148.)

1 **III. Failure to State a Claim**

2 **A. Count Five**

3 Plaintiff's Count Five is not a cause of action but is a request for declaratory and
 4 injunctive relief. As such, Plaintiff's Fifth Cause of Action fails to state a claim and will
 5 be dismissed.

6 **B. Doe Defendants**

7 Plaintiff does not say in what capacity he sues the unnamed Doe Defendants.
 8 Because Plaintiff is only seeking declaratory and injunctive relief, he does not appear to be
 9 suing the Doe Defendants in their individual capacities for monetary damages. Moreover,
 10 Plaintiff has not alleged any facts showing that any Doe Defendant was personally involved
 11 in the deprivation of his civil rights, which is necessary to impose individual liability.
 12 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (for a person to be liable in his
 13 or her individual capacity, a plaintiff "must allege facts, not simply conclusions, that show
 14 that the individual was personally involved in the deprivation of his civil rights"). By
 15 comparison, a suit against a defendant in his or her *official* capacity represents only another
 16 way of pleading an action against the entity that employs the defendant. *Kentucky v.*
 17 *Graham*, 473 U.S. 159, 165 (1985). That is, the real party in interest is not the named
 18 defendant, but the entity that employs the defendant. *Id.* To bring a claim against an
 19 individual in his official capacity, a plaintiff must show that the constitutional deprivation
 20 resulted from the entity's policy, custom, or practice. *Id.*; *Monell v. Dep t of Soc. Servs.*,
 21 436 U.S. 658, 694 (1978).

22 As set forth in Section V *infra*, Plaintiff has sufficiently stated claims against
 23 Defendants Shinn, Scott, and Kimble in their official capacities. Because Shinn, Scott, and
 24 Kimble are the proper respondents to Plaintiff's official capacity claims, the Court will
 25 dismiss the Doe Defendants.

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1 **IV. Claims for Which an Answer Will be Required**

2 **A. Eighth Amendment Claims—Counts One and Two**

3 To state an Eighth Amendment conditions-of-confinement claim, plaintiffs must
 4 meet a two-part test. “First, the alleged constitutional deprivation must be, objectively,
 5 sufficiently serious” such that the “official’s act or omission must result in the denial of the
 6 minimal civilized measure of life’s necessities.” *Farmer v. Brennan*, 511 U.S. 825, 834
 7 (1994) (internal quotations omitted). Second, the prison official must have a “sufficiently
 8 culpable state of mind,” i.e., he must act with “deliberate indifference to inmate health or
 9 safety.” *Id.* (internal quotations omitted). Deliberate indifference is a higher standard than
 10 negligence or lack of ordinary due care for the prisoner’s safety. *Id.* at 835. In defining
 11 “deliberate indifference” in this context, the Supreme Court has imposed a subjective test:
 12 “the official must both be aware of facts from which the inference could be drawn that a
 13 substantial risk of serious harm exists, *and* he must also draw the inference.” *Id.* at 837
 14 (emphasis added).

15 Plaintiff has sufficiently alleged Eighth Amendment claims against Defendants
 16 Shinn, Scott, and Kimble in their official capacities in Counts One and Two, and they will
 17 be required to answer these claims.

18 **B. ADA and RA—Counts Three and Four**

19 Under Title II of the ADA, “no qualified individual with a disability shall, by reason
 20 of such disability, be excluded from participation in or be denied the benefits of the
 21 services, programs, or activities of a public entity, or be subjected to discrimination by any
 22 such entity.” 42 U.S.C. § 12132. To state an ADA claim, a plaintiff must demonstrate
 23 that:

- 24 (1) he is an individual with a disability; (2) he is otherwise
 25 qualified to participate in or receive the benefit of some public
 26 entity’s services, programs, or activities; (3) he was either
 27 excluded from participation in or denied the benefits of the
 28 public entity’s services, programs, or activities, or was
 otherwise discriminated against by the public entity; and (4)
 such exclusion, denial of benefits, or discrimination was by
 reason of [his] disability.

1 *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1021 (9th Cir. 2010) (quoting *McGary v.*
 2 *City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004)) (alteration in *McGary*), *overruled*
 3 *on other grounds by Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016).

4 The RA “is materially identical to and the model for the ADA, except that it is
 5 limited to programs that receive federal financial assistance.” *Armstrong v. Davis*, 275
 6 F.3d 849, 862 n.17 (9th Cir. 2001) (internal quotation omitted), *abrogated on other*
 7 *grounds by Johnson v. California*, 543 U.S. 499 (2005). Because the ADA has a broader
 8 scope, the Ninth Circuit analyzes both Acts under an ADA standard. *See Armstrong*, 275
 9 F.3d at 862; *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999)
 10 (“There is no significant difference in analysis of the rights and obligations created by the
 11 ADA and the Rehabilitation Act. . . . Thus, courts have applied the same analysis to claims
 12 brought under both statutes.”).

13 Plaintiff has sufficiently stated claims in Counts Three and Four against Defendants
 14 Shinn, Scott, and Kimble in their official capacities, and they will be required to answer
 15 these claims.

16 **IT IS ORDERED:**

- 17 (1) Count Five of the Complaint (Doc. 1) is **dismissed** without prejudice.
- 18 (2) Defendants John Does are **dismissed** without prejudice.
- 19 (3) Defendants Shinn, Scott, and Kimble must answer Counts One through Four
 20 of the Complaint (Doc. 1) or otherwise respond by appropriate motion by **Wednesday,**
 21 **April 20, 2022.**
- 22 (4) The Clerk of Court must terminate the reference to Magistrate Judge James
 23 F. Metcalf.

24 Dated this 14th day of April, 2022.

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 28 Honorable Diane J. Humetewa
 29 United States District Judge